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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 166

CIVIL

MAURICE H. SIGLER, WARDEN, NEBRASKA STATE PENITENTIARY, Petitioner,

V.

ROBERT WILLIAM LOSIEAU, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Your petitioner, Maurice H. Sigler, as Warden of the Nebraska State Penitentiary, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on Feburary 4, 1969, rehearing of which was denied on February 28, 1969.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported in 406 F.2d 795. A copy of such opinion is separately attached hereto in Appendix No. 1.

The opinion of the United States District Court for the District of Nebraska, not reported, copy of which is attached hereto in Appendix 2.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on February 4, 1969. Appendix 1. This judgment reversed the judgment of the United States District Court for the District of Nebraska. Appendix 2.

An order denying a rehearing was entered by the United States Court of Appeals for the Eighth Circuit on February 28, 1969.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where a 1945 conviction is valid, and the 1945 conviction and sentence are used to enhance penalty under the Nebraska Habitual Criminal Law in a 1952 conviction, may a question of whether or not defendant's counsel was present at time of the sentence on the 1945 conviction be raised in a habeas corpus petition to set aside the 1952 habitual criminal sentence or may a question as to the 1945 sentence only be raised to correct the 1945 sentence?

2. Where a defendant could have challenged a 1945 sentence and been resentenced thereunder but fails to do so until after the 1945 conviction and sentence

are used to enhance the penalty of a 1952 conviction at which time he raises no objection, may said defendant by his failure to timely question 1945 sentence and have a valid resentence entered later benefit by said failure by throwing out the 1952 sentence or has he waived his objection thereto?

3. What is the remedy for a sentence invalid for lack of counsel where the conviction upon which the sentence was based is valid?

4. If the defendant's 1945 sentence is invalid and he may still raise this to invalidate the 1952 sentence may the defendant niow be resentenced under the 1945 conviction?

5. Where the record shows a defendant had counsel present at arraignment, waived preliminary examination, twenty-four hour service of information, was arraigned and plead guilty and said record further shows that on the following day defendant is arraigned for sentence upon his plea of guilty theretofore entered, is informed by the court of the nature of said plea, the consequence thereof, and the penalty attached by law thereto and that defendant being thus advised and instructed still adheres to his said plea of guilty after which he is sentenced, can said record be said to be a "silent record"?

6. Where the record is as described in the previous question and the accused introduces evidence in a habeas proceeding in Federal Court tending to show that he was not in fact represented by counsel at the time of sentencing, does the burden of proof then shift to the State to prove by a fair preponderance of the evidence that the accused was in fact represented by counsel at sentencing?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2) United States Constitution, Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for partici-

pation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(3) Section 29-2221, Reissue Revised Statutes of Nebraska for 1943, Reissue 1964, Vol. 2A, p. 474.

"(1) Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by

the United States, for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than ten nor more than twenty years; *Provided,* that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern.

"(2) Where punishment of an accused as an habitual criminal is sought, the facts with reference thereto must be charged in the indictment or information which contains the charge of the felony upon which the accused is prosecuted, but the fact that the accused is charged with being an habitual criminal shall not be an issue upon the trial of the felony charge and shall not in any manner be disclosed to the jury. If the accused is convicted of a felony and before sentence is imposed, a hearing shall be had before the court alone as to whether such person has been previously convicted of prior felonies. The court shall fix a time for the hearing and notice thereof shall be given to the accused at least three days prior thereto. At the hearing, if the court shall find from the evidence submitted that the accused has been convicted two or more times of felonies and sentences imposed therefor by the courts of this or any other state, or by the United States, the court shall sentence such person so convicted as an habitual criminal.

"(3) If the person so convicted shall show to the satisfaction of the court before whom such conviction was had that he was released from imprisonment, upon either of such sentences, upon a pardon granted for the reason that he was innocent, such conviction and sentence shall not be considered as such under sections 29-2221 and 29-2222."

Source: Laws 1921, c. 131, § 1, p. 543; C.S. 1922, § 10177; C.S. 1929, § 29-2217; Laws 1937, c. 68, § 1, p. 252; C.S.Supp., 1941, § 29-2217; R.S. 1943, § 29-2221; Laws 1947, c. 105, § 1, p. 294.

(4) 28 U.S.C.A. § 2254:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967."

(5) Section 28-532, R. R. S. 1943; Reissue for 1964 Vol. 2A, p. 159.

"Whoever willfully, maliciously and forcibly breaks and enters into any dwelling house, kitchen, smokehouse, slaughterhouse, shop, office, storehouse, mill, pottery, factory, watercraft, schoolhouse, church or meeting house, barn, chicken house, stable, warehouse, malthouse, stillhouse, public building, or other private building, railroad car factory, station house, railroad car, public or private telephone pay station or booth, with intent to kill, rob, commit a rape, or commit any felony, or with intent to steal property of any value, shall be punished by imprisonment in the Nebraska Penal and Correctional Complex not more than ten years nor less than one year, or by a fine not exceeding five hundred dollars, or imprisonment in the jail of the county not exceeding six months."

Source: Laws 1905, c. 184, § 1, p. 677; R.S. 1913; § 8643; Laws 1915, c. 156, § 1, p. 326; C.S. 1922, § 9623; C.S. 1929, § 28-538.

STATEMENT OF THE CASE

Robert William Losieau was convicted of burglary in 1952. Following his conviction by jury the court held a hearing outside the presence of the jury under the Nebraska practice to determine whether or not the penalty for burglary should be enhanced under the Nebraska Habitual Criminal Statute. One of the previous convictions and sentences used to enhance the penalty at this hearing was a 1945 conviction for stealing a car and sentenced to the Nebraska Penitentiary for three years which the defendant had served. The 1945 conviction and sentence were not appealed and had not been questioned prior to the 1952 hearing. They were not questioned at the 1952 hearing. In 1965 the defendant filed a verified motion in the District Court of Douglas County, Nebraska to vacate the 1945 conviction and sentence. This is reported in the Supreme Court of Nebraska in 180 Neb. 671, 144 N. W. 2d 406. The Journal Entry of the Court on August 2, 1945 showed that the defendant, Robert William Losieau was brought into court in the custody of the sheriff and Deputy Public Defender Ed Hayes representing him. That the defendant waived the filing of the complaint, preliminary examination, service of a copy of the information heretofore filed and the time provided by law for being required to answer and his assent arraigned for plea. The information being read to him for plea thereto, the defendant says he is guilty of stealing automobile as charged therein. Whereupon sentence is deferred and said defendant is remanded to the custody of the sheriff. The sentence entered the next day shows that defendant was arraigned for sentence

upon his plea of guilty to the charge of stealing an automobile as heretofore entered and was informed by the court of the nature of the said plea and of the consequences thereof and of the penalty attached by law thereto and that after being advised and instructed the defendant adhered to his said plea of guilty and said that he desired to stand thereon. The record on the day of sentencing is silent as to whether or not his attorney Ed Hayes was present.

Losieau later filed the present habeas corpus proceeding under 28 U.S.C.A. § 2254 in Federal District Court for the District of Nebraska claiming, among other things, that he was not represented by counsel at the time he plead guilty to the 1945 conviction nor at the time he was sentenced on the 1945 conviction and thereby sought to have the 1952 sentence vacated because the 1945 conviction and sentence was one of the cases used to enhance penalty under the 1952 conviction. At no time has he brought an action to vacate the 1945 sentence and to be resentenced thereunder.

The Federal District Court concluded that petitioner had been furnished counsel when he plead guilty in 1945 and that it was immaterial whether or not counsel was provided at sentencing in 1945 because the normal remedy for counsel is not present at the time of sentencing is to have the individual resentenced. That the defect does not affect the validity of the conviction.

The United States Court of Appeals for the Eighth Circuit disagreed, partly because a Nebraska Habitual Criminal Statute, Section 29-2221 provides in part that

> "Whoever has been twice convicted of crime, sentenced and committed to prison, * * * , for terms of not less than one year each, shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal, * * *."

and partly upon its interpretation of this Court's opinion in *Burgett* v. *State of Texas,* 389 U. S. 109, citing *Greer* v. *Beto,* 384 U. S. 269 that

> "Each conviction, sentence and imprisonment must be valid or it cannot be used to enhance punishment for another offense."

The United States Court of Appeals further held that on retrial in a Federal District Court the burden of proof would be on the state to prove that the accused was represented by counsel at his 1945 sentencing.

REASONS FOR ALLOWING THE WRIT

The Court of Appeals for the Eighth Circuit has decided two very important questions of federal law which have not been, so far as we have been able to determine, but should be, settled by this court.

The Court of Appeals has furthermore decided an important state question in a way contrary to the applicable state law of the State of Nebraska.

Furthermore the United States Court of Appeals has rendered a decision in conflict with the accepted rules of evidence as to the burden of proof in 28 U.S.C. § 2254 cases.

1. The Court of Appeals for the Eighth Circuit in the instant case held that "each conviction, sentence and imprisonment must be valid or it cannot be used to enhance punishment for another offense." In support of this it cited *Burgett* v. *State of Texas,* 389 U. S. 109, 115, 19 L. Ed. 2d 319.

As this court is well aware, *Burgett* v. *Texas* could not have reached such a conclusion because the ques-

tioned prior convictions were never admitted into evidence and the only question involved was whether the mention of them in front of the jury prejudiced the defendant on his present conviction; it had nothing to do with enhancement or the vacation of a later sentence based thereon. The Court of Appeals further cites. *Greer* v. *Beto*, 384 U. S. 269, cited in the *Burgett* case.

However, *Greer* v. *Beto* can be no authority for the present question concerning only the prior sentence, when the conviction is not in doubt, since in *Greer* v. *Beto* the accused was not represented by counsel when he entered his plea of guilty, thus his actual conviction was invalid.

The third case the Court of Appeals cited in support of the above proposition is *Williams* v. *Coiner*, 392 F. 2d 210 (Fourth Circuit 1968). However the *Williams* case also fails to reach the present question, because in both the previous convictions in the *Williams* case the defendant plead guilty without counsel.

2. The Court of Appeals in the instant case, next goes through several Supreme Court of Nebraska cases which hold that an invalid sentence does not void a lawful conviction and that the most a defendant is entitled to is a resentence in such cases. It then states that it will not follow these cases because none of them were decided upon the basis of lack of counsel at sentence and without citing any other cases takes the opposite view and holds that if the 1945 sentence is invalid, it cannot be validated in 1968 to support the 1952 habitual criminal sentence. This begs the question inasmuch as the Nebraska Supreme Court has held that a voidable sentence is nevertheless a sentence insofar as the habitual criminal statute is concerned.

This is strictly a question of state statutory interpretation and does not amount to a constitutional question. As a matter of fact in *Burgett* v. *Texas, supra,* neither of the statutes involved required a previous sentence but only previous convictions (389 U. S. 109, 110, note 2 and 3). The same or similar statutes were involved in *Spencer* v. *Texas,* 385 U. S. 554, 17 L. Ed. 2d 606. Obviously if the Nebraska statute could constitutionally require only a showing of previous convictions and nothing were said about sentences, the Supreme Court of Nebraska may constitutionally construe an invalid sentence which does not void the conviction as being sufficient to meet the statutory requirement under the habitual criminal statute.

The U. S. Court of Appeals in choosing not to follow the Supreme Court of Nebraska holdings in this regard and stating its own new rule then cited the case of *Oksanen* v. *United States,* 362 F. 2d 74. This case involved a federal conviction under the Dyer Act, a suspended sentence and probation imposed without the presence of an attorney; probation was later revoked and then the sentence completely vacated on motion of the defendant in the same action. The question of the invalid sentence supporting a later enhancement penalty was not involved.

3. The Court of Appeals in the instant case next states that the right to counsel extends to the sentencing proceeding citing *Mempha* v. *Rhay,* 389 U. S. 128, 19 L. Ed. 2d 336. However the remedy in *Mempha* v. *Rhay* was not to avoid the conviction, as the court would in effect do in this case, but was to remand the case for resentencing in the instant case.

In *Witherspoon* v. *Illinois,* 391 U. S. 510, 20 L. Ed. 2d 776, the court very clearly recognized the distinc-

tion between the conviction and the sentence, holding that the selective exclusion of prospective jurors opposed to the death penalty, on the basis of the record before it or as a matter of judicial notice, did not affect the issue of guilt. The court pointed out that the jury was entrusted with two distinct responsibilities, i.e., first to determine whether the petitioner was innocent or guilty and second, if guilty, to determine whether his sentence should be imprisonment or death. The court refused to set aside the conviction, but merely the sentence. We respectfully submit that were the 1945 conviction and sentence here involved submitted under the *Witherspoon* v. *Illinois, supra,* rationale that on the record submitted the conviction could not be set aside and defendant's remedy should have been to have asked for a resentence before he served the one given him.

4. The Court of Appeals in the instant case next held that where the record is silent as to whether an accused is furnished counsel at a critical stage and where the accused introduces evidence tending to show that he was not in fact so represented the burden of proof then shifts to the state to prove that the accused was represented.

In support of this the court again cites *Burgett* v. *Texas, supra. Burgett* v. *Texas* simply could not have established the rule of the Court of Appeals attaches to it since no testimony was offered in that case to overcome the records. One of the records simply showed on its fact that the defendant was present without counsel. In fact consideration of all the prior convictions was withdrawn from the jury since the last Tennessee conviction for forgery was all that had been accepted. 389 U. S. 109, 113 note 6. The court in the present

case overlooks the strong record which shows that the defendant did have counsel at his arraignment and was strongly protected by the court at his sentencing, the record merely being silent as to the presence of the attorney which was only one day later.

The court further cites *Wilson* v. *Wiman*, 386 F. 2d 968, but the court specifically pointed out in that case how the record in *Wilson* v. *Wiman* differed from that in *Burgett* v. *Texas*. The same is true in the present case. The further authority, for the theory of the shifting of the burden of proof, cited by the Court of Appeals in the instant case is *McCloud* v. *Rundle* (3rd Circuit, October, 1968) 402 F. 2d 853. There the court specifically pointed out that under Rule 11 of the Federal Rules of Criminal Procedure that the burden of proof shifted to the government where the terms of the rule in relation to the voluntariness of a plea of guilty were not established. This of course would have no bearing upon the shifting of the burden of proof in a federal habeas corpus proceeding involving a state court conviction.

The cases are legion under 28 U.S.C.A. § 2254 cases that the burden of proof is on the applicant. Under the circumstances described by the Court of Appeals above, perhaps the state has a burden of coming forward with additional evidence, but when it has done that, surely in weighing the final outcome the burden of proof remains with the applicant.

CONCLUSION

Petitioner respectfully prays that his petition for certiorari be granted.

Respectfully submitted,

Maurice H. Sigler, Warden, Nebraska State Penitentiary, Petitioner,

By Clarence A. H. Meyer,
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APPENDIX NO. 1

Robert William Losieau, Appellant,

V.

Maurice H. Sigler, Warden, Nebraska State Penitentiary, Appellee.

No. 19178.

United States Court of Appeals
Eighth Circuit.
Feb. 4, 1969.

Rehearing Denied Feb. 28, 1969.

Habeas corpus proceeding brought by prisoner to have 1952 Nebraska conviction and sentence as a habitual criminal set aside so that his prison terms, if served to completion, would expire in 1982 rather than 1987. The United States District Court for the District of Nebraska, Robert Van Pelt, J., denied relief and petitioner appealed. The Court of Appeals, Heaney, J., held that whether petitioner had been represented by counsel when he was sentenced for offense used in subsequent habitual criminal sentence was fact question which must be determined by federal district court.

Reversed and remanded.

1. Criminal Law 1202(1)

Nebraska Habitual Criminal Act can be invoked only when felon has been twice previously convicted, sentenced and imprisoned and each conviction, sentence and imprisonment must be valid or it cannot be used to enhance punishment for another offense. R.R.S. Neb. 1943, § 29-2221.

2. Criminal Law 1202(1)

Inasmuch as Nebraska Habitual Criminal Act can be invoked only when felon has been twice previously con-

victed, sentenced and imprisoned, validity of prior sentence was not irrelevant in determining whether habitual criminal sentence was properly imposed, even though failure to have counsel present at time of sentencing can normally be remedied by resentencing. R.R.S. Neb. 1943, § 29-2221.

3. Criminal Law 1202(1)

If 1945 sentence was invalid for lack of counsel representing defendant at time of sentencing, such invalid sentence could not be validated in 1968 years later for purpose of supporting a 1952 habitual criminal sentence. R.R.S. Neb. 1943, § 29-2221.

4. Habeas Corpus 85.2(2)

Where record affirmatively demonstrated that petitioner had been represented by counsel at time of his arraignment and pleading guilty, petitioner had burden of impeaching record in habeas corpus proceeding.

5. Habeas Corpus 85.5(9)

Petitioner for federal habeas corpus, seeking to have conviction and sentence as habitual criminal set aside, failed to meet his burden of proving that he had not been represented by public defender when he had been arraigned and had pleaded guilty to one of prior offenses.

6. Criminal Law 988

Right of accused to counsel extends to sentencing proceeding.

7. Courts 100(1)

Accused's right to counsel in criminal proceeding is to be applied retroactively.

8. Habeas Corpus 92(1)

Whether petitioner had been represented by counsel when he was sentenced for offense used in subsequent habitual criminal sentence was fact question which must be determined by federal district court in habeas corpus proceeding brought by petitioner to have habitual criminal sentence set aside.

9. Habeas Corpus 85.2(2)

Ordinarily, burden of proof is on accused to establish that he was denied right to counsel at criminal proceeding.

10. Habeas Corpus 85.5(9)

Where record is silent as to whether accused was furnished counsel at critical stage and accused introduces evidence tending to show that he was not in fact so represented, burden then shifts to state to prove, by fair preponderance of the evidence, that accused was represented.

Vincent L. Dowding, of Luebs, Tracy & Huebner, Grand Island, Neb., for appellant.

Melvin K. Kammerlohr, Asst. Atty. Gen., State of Nebraska, Lincoln, Neb., for appellee; Clarence A. H. Meyer, Atty. Gen., of Nebraska, was with him on the brief.

Before MATTHES, MEHAFFY and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

The petitioner has spent most of his adult life in prison. This habeas corpus appeal is the culmination of efforts on his part to have a 1952 Nebraska con-

viction and sentence as a habitual criminal set aside so that his prison terms, if served to completion, would expire in 1982 rather than 1987.[1] To set the 1952 conviction aside, it is necessary to find that the petitioner was deprived of the right to appointed counsel at a critical stage in the 1939 and 1945 criminal proceedings on which the habitual criminal sentence was based.[2] The trial court held that it was not necessary to determine the validity of the proceedings. We reverse and remand.

The petitioner was first convicted in 1939 by a Nebraska state court for armed robbery. Convictions followed in 1945 (stealing an automobile—Nebraska), 1948 (nine crimes involving possessing, passing and forging United States Postal Money Orders—United States District Court), 1952 (burglary—Nebraska), and 1962 (breaking and entering—Nebraska).[3] His pun-

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[1] The petitioner was sentenced to twenty years imprisonment in 1952 as a result of being determined a habitual criminal. The maximum penalty for burglary is ten years. Apparently, he accumulated good behavior time as his 1952 sentence was completed on December 19, 1967. The petitioner seeks to void the 1952 habitual criminal determination by this action. If he is successful, then the twenty-year sentence imposed in 1962 will have begun to run on the day it was entered instead of beginning to run on December 20, 1967, the day after completion of the 1952 senence. Thus, the petitioner will be released in 1982 instead of 1987.

[2] The Nebraska Habitual Criminal Act, Reissue Revised Statutes of 1943, § 29-2221, provides:

> "*29-2221. Habitual criminal, defined; procedure for determination; hearing; penalty; effect of pardon.* (1) Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each shall upon conviction of a felony committed in this state, be deemed to be an habitual criminal, and shall be punished by imprisonment in the Nebraska Penal and Correctional Complex for a term of not less than ten nor more than twenty years; *Provided*, that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern."

[3] *1948 Conviction*: Losieau v. United States, 177 F.2d 919 (8th Cir. 1949). The Court denied Losieau's motion to vacate judgment and sentence. The case below was not reported.

ishment was enhanced in 1952 and 1962 pursuant to the provisions of the Nebraska Habitual Criminal Act. On each occasion, as a result, the petitioner received a twenty-year sentence.

The attack on the 1952 habitual criminal conviction and sentence was instituted in two Nebraska District Courts. Each court denied relief without conducting a full evidentiary hearing. The petitioner appealed both decisions to the State Supreme Court. It also denied relief.[4] He then filed a petition with the United States District Court for the District of Nebraska in each case. That court consolidated the matters and gave a full evidentiary hearing on all issues raised by the petitioner. It denied his petition. It found that the petitioner was furnished counsel when he pled guilty in 1945. It held that whether counsel was provided at sentencing was immaterial. It reasoned:

> "* * * [T]he normal remedy where counsel was not present at the time of sentencing is to have the individual resentenced. The defect does not affect

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1952 Conviction: Losieau v. State, 157 Neb. 115, 58 N.W.2d 824 (1953). Direct appeal. The Supreme Court of Nebraska affirmed the conviction.

1962 Conviction: State v. Losieau, 174 Neb. 320, 117 N.W.2d 775 (1962), *cert. denied sub nom.* Losieau v. Nebraska, 374 U.S. 814, 83 S.Ct. 1707, 10 L.Ed.2d 1037 (1963). Direct Appeal. The Supreme Court of Nebraska affirmed the conviction. State v. Losieau, 179 Neb. 54, 136 N.W.2d 168 (1965). Direct appeal. The Supreme Court of Nebraska denied the petitioner's motion for new trial. State v. Losieau, 180 Neb. 696, 144 N.W.2d 835 (1966). Post conviction. The Supreme Court of Nebraska, reversing the District Court, held that the petitioner's habeas corpus petition was not brought prematurely although he had not begun to serve the sentence. State v. Losieau, 182 Neb. 367, 154 N.W.2d 762 (1967). Post conviction. The Supreme Court of Nebraska affirmed the District Court's denial of Losieau's motion to vacate his conviction.

[4] State v. Brevet, 180 Neb. 616, 144 N.W.2d 210 (1966), *cert. denied sub nom.* Losieau v. Nebraska, 386 U.S. 967, 87 S.Ct. 1050, 18 L.Ed.2d 119 (1967). The petitioner used the alias "Brevet" at his 1939 conviction.

State v. Losieau, 180 Neb. 671, 144 N.W.2d 406 (1966). 1945 conviction.

> the validity of the conviction. United States ex rel. Wagner v. Myers, 234 F.Supp. 239 (E.D.Penn. 1964); Hollis v. Ellis, 201 F.Supp. 616 (S.D.Tex. 1961). Where the conviction has been used in an habitual criminal charge, it is the validity of the conviction which is important, not that of the sentence. See the memorandum opinion of this court in Kennedy v. Sigler, 1243L. It would seem to be irrelevant to the question raised here whether petitioner had counsel at the sentencing or not."

[1, 2] We do not agree that the validity of the 1945 sentence is irrelevant. The Nebraska Habitual Criminal Act can be invoked only when a felon has been twice previously convicted, sentenced and imprisoned. Further, each conviction, sentence and imprisonment must be valid or it cannot be used to enhance punishment for another offense. See, Burgett v. State of Texas, 389 U. S. 109, 115, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); Greer v. Beto, 384 U.S. 269, 86 S. Ct. 1477, 16 L. Ed. 2d 526 (1966); Williams v. Coiner, 392 F. 2d 210 (4th Cir. 1968).

In *Burgett,* the Court said:

> "* * * To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right."

389 U. S. at 115, 88 S. Ct. at 262.

The trial court's statement that an invalid Nebraska sentence can ordinarily be validated by resentencing and thus does not void a lawful conviction for the same crime is supported by Nebraska case law, State v. Burnside, 181 Neb. 20, 146 N. W. 2d 754, 756 (1966), cert.

denied, Burnside v. Sigler, 387 U. S. 936, 87 S. Ct. 2063, 18 L. Ed. 2d 1000 (1967); Kennedy v. State, 171 Neb. 160, 105 N. W. 2d 710, 721 (1960) [dicta]; Haswell v. State, 167 Neb. 169, 92 N.W.2d 161, 165 (1958), and by the language of this Court in Kennedy v. Sigler, 397 F. 2d 556, 560 (8th Cir. 1968). We do not believe, however, that the cited cases are controlling here.

The statement had its origin in *Haswell.* There, the defendant was charged with and convicted of the offense of rape, and was given an indeterminate sentence. He appealed to the Supreme Court of Nebraska contending that an indeterminate sentence may not be imposed on one convicted of a crime of violence against a person of another, and that as he had been given such a sentence, his conviction must be set aside. The Nebraska Supreme Court held that the indeterminate sentence was improperly imposed but sustained the conviction. It remanded the matter to the County Court with directions to impose a proper sentence.

In Kennedy v. State, supra, the defendant was convicted as a habitual criminal in 1959. The state relied on two prior burglary convictions as the basis for the conviction. The defendant contended on appeal that it erred in so doing as he had been erroneously sentenced on one of the prior convictions to serve a period of two years at the Nebraska State Reformatory when he was less than sixteen years of age. The court held that the defendant had failed to establish that he was in fact less than sixteen years of age when the allegedly improper sentence was imposed, thus the sentence was valid. It added by way of dicta:

> "* * * This court recently reaffirmed and concluded in Haswell v. State, 167 Neb. 169, 92 N.W.2d 161, that an unauthorized or erroneous sentence does not void a lawful conviction. In any

> event the age of an accused when he has been twice convicted, sentenced, and committed to prison on a felony charge has no bearing on the question of whether or not he was an habitual criminal within the statutory meaning thereof."

105 N. W. 2d at 721.

In *Burnside*, the defendant was charged with robbery. The information also contained a count under the habitual criminal statute. The defendant was found guilty and sentenced to fifteen years in the Nebraska State Penitentiary. No appeal was taken. The defendant then sought relief under the Nebraska Post Conviction Statute. He contended that he had been improperly sentenced as a habitual criminal as such a sentence cannot be imposed where a greater punishment is provided for the current offense. The State District Court granted the defendant's motion as the punishment for the crime of robbery—three to fifty years—exceeded that permissible as a habitual criminal. The State District Court set aside the previous sentence under the habitual criminal act and reimposed the fifteen year sentence under the appropriate statute. The defendant appealed to the Nebraska Supreme Court where he contended that the conviction must also be set aside as the initial sentence was improper. The court stated:

> "* * * We assume, for the purpose of this case, that the original sentence on the finding that the defendant was a habitual criminal is erroneous. But, the finding that the defendant is a habitual criminal does not constitute conviction and sentence for any separate offense. This charge and information merely permitted the court to inflict a greater penalty because of the defendant's previous convictions. Davis v. O'Grady, 137 Neb. 708, 291 N.W. 82. Defendant was tried and convicted by a jury for the offense of robbery. *His motion does not allege that he was deprived of any*

> *constitutional rights up to the time of his trial and conviction.* His main contention relates to the erroneousness of his sentence. We have repeatedly held that an unauthorized or erroneous sentence does not void a lawful conviction. Kennedy v. State, 171 Neb. 160, 105 N.W.2d 710; Haswell v. State, 167 Neb. 169, 92 N.W.2d 161. We find no merit in the defendant's contention.
>
> "The record here shows that the most the defendant was entitled to was a vacation of the original sentence and a resentence on the count of robbery for which he was properly tried and convicted. This relief he was granted. The new sentence was for the same period of time as the original sentence and began on the same date, November 3, 1960. The defendant is simply dissatisfied with the length of this sentence. But, it is clear that the new sentence was within the limits of the statutory penalty of 3 to 50 years for the crime charged and is a valid sentence. The record fails to reveal any abuse of discretion in the imposition of the new sentence."

146 N. W. 2d at 756 (Emphasis added.).

Only *Haswell* and *Burnside* hold that an invalid sentence does not affect the validity of a valid conviction. In neither case, however, was the court presented with the question of whatever a sentence, void for lack of counsel, can be retroactively validated after it has been fully served to support the imposition of a habitual criminal sentence imposed during the period that the sentence was void.

[3] We are faced with the undecided question. We hold that if the defendant's 1945 sentence is invalid, it cannot be validated in 1968 for the purpose of supporting a 1952 habitual criminal sentence. Oksanen v. United States, 362 F.2d 74, 80, 81 (8th Cir. 1966).[5] To

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[5] In Oksanen v. United States, 362 F.2d 74 (8th Cir. 1966), Judge Gibson discussed the implications of a sentence imposed without counsel. He stated:

reach any other conclusion under the facts of this case would be to render meaningless the defendant's right to counsel in 1945. It is obviously impossible at this late date to recreate the conditions that existed in 1945.

We turn to an examination of the validity of the convictions and sentences in 1939 and 1945.

THE 1939 PROCEEDINGS

The evidence introduced at petitioner's hearing before the United States District Court showed that the petitioner—age nineteen—was arrested on September 1, 1939, for armed robbery (involving $18.30). On the same day, he waived the statutory time of service and time to plead. He entered a plea of guilty and was sentenced as a first offender to seven years in the Nebraska State Penitentiary.[6] He was transported to prison on September 2d. He was without counsel during all stages of the proceeding.

The state does not dispute what is now settled law that the petitioner, as an indigent, was entitled to appointed counsel and that such counsel was not furnished. Gideon v. Wainwright, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); United States ex rel. Durocher v.

"* * * [T]he * * * absence of counsel would seem to be a jurisdictional bar to the trial court's act of sentencing. Any acts by the court after its jurisdiction has been destroyed are considered void. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Boruff v. United States, 310 F.2d 918 (5 Cir. 1962); Thompson v. King, 107 F.2d 307 (8 Cir. 1939). * * *"

Id. 362 F.2d at 78.

[6] The "Journal Entry," which purported to journalize the 1939 proceedings, was not filed until April 7, 1952. On February 5, 1965, the petitioner moved to vacate his 1939 conviction on the grounds he was convicted of a crime for which he was not charged. On February 8, 1965, the County Attorney moved for an order *nunc pro tunc* correcting the journal to read "armed robbery" insead of "burglary." On February 19, 1965, a hearing was held on both motions. The court granted the County Attorney's motion and denied the petitioner's motion.

LaVallee, 330 F. 2d 303 (2d Cir.)(En banc), cert. denied, 377 U. S. 998, 84 S. Ct. 1921, 12 L. Ed. 2d 1048 (1964). See generally, 5 A.L.R.3d 1269; 93 A.L.R.2d 747; 20 A.L.R.2d 1240; 3 A.L.R.2d 1003. Nor does it dispute the petitioner's contention that *Gideon* is not limited to prospective applications. See, Burgett v. State of Texas, supra; Doughty v. Maxwell, 376 U. S. 202, 84 S. Ct. 702, 11 L. Ed. 2d 650 (1964); Pickelsimer v. Wainwright, 375 U. S. 2, 84 S. Ct. 80, 11 L. Ed. 2d 41 (1963). It contends, however, that the petitioner was fully advised of his right to appointed counsel and waived that right. It bases its contention on Journal Entry No. 1514 of the District Court of Hall County, Nebraska. That entry, made on September 1, 1939, read:

> "The defendant was brought into open court, where he acknowledged his real and true name to be Robert William Brevet. The defendant being without counsel was interrogated as to his age, education and understanding of the proceedings, and the Court deeming him to have an understanding of the proceedings, *he was asked whether or not he desired to have counsel and he stated that he did not desire to be represented by counsel.*
>
> "Thereupon, the defendant was arraigned on the information and was informed of the alternatives open to him by way of pleas; whereupon, the defendant entered a plea of guilty to the charge of burglary as set out in the information.
>
> "Thereupon, it was by the Court considered, ordered and adjudged that the defendant is guilty of the offense of burglary as charged in the information, and the defendant was advised of said judgment of conviction and the duty of the Court to pass sentence upon him.
>
> "Thereupon, the defendant was asked if he had anything to say why judgment should not be passed against him and he replied in the negative.

> "WHEREUPON, the Court being fully advised in the premises, it is the judgment and sentence of the Court that for the offense of burglary as set out in the information, of which he had been convicted, the defendant be, and hereby is imprisoned in the Nebraska State Penitentiary at Lancaster, in Lancaster County, Nebraska, for a period of seven (7) years, at hard labor, Sundays and holidays excepted, solitary confinement to be no part of this sentence, and the defendant to pay the costs of these proceedings. The defendant to stand committed until discharged according to law. Commitment ordered accordingly." (Emphasis added.)

The state supplements this Journal Entry by referring to a decision of the Supreme Court of Nebraska. State v. Brevet, 180 Neb. 616, 144 N. W. 2d 210, 212 (1966), cert. denied sub nom. Losieau v. Nebraska, 386 U. S. 967, 87 S. Ct. 1050 (1967). That decision reports a slightly different version of the colloquy taken from the Court Reporter's notes:[7]

> "The court thereupon interrogated the defendant and adduced the following facts: Defendant gave his name as Robert William Brevet. He stated he was ready to be arraigned on the information filed against him. He gave his age as 24. He stated he understood the charge against him and that the offense carried a penalty of 3 to 50 years in the penitentiary. He stated he understood he was entitled to have an attorney represent him if he wished one. * * * He was then asked if he was ready to plead to the information and his answer

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[7] The Court Reporter's notes of the 1939 proceedings which were considered by the Nebraska Supreme Court in State v. Brevet, *supra*, were apparently contained in the Bill of Exceptions. Mr. Buechler, attorney for the petitioner in *Brevet*, submitted an affidavit in which he said, in effect, that he lost the Bill of Exceptions. The notes were not introduced in the District Court although the petitioner expressed a desire that the court order the state to produce them.

[8] The petitioner lied. He was nineteen years old at the time.

was 'Yes, sir.' He was then asked 'And what do you plead to the information? . . . He answered 'Guilty.' "

The Supreme Court of Nebraska accepted the State's contention that the petitioner had validly waived counsel. It stated:

> "Now, more than 25 years later, he asserts it was necessary that he should have been told he was entitled to legal counsel at the expense of the state before his constitutional right to legal counsel could be waived. But we pointed out that he stated he did not want an attorney. From the record it is made clear that he did not want a lawyer at his own expense, at the expense of the state, nor at the expense of anyone else. He had not only entered his plea of guilty, but he had testified to the details of the armed robbery which he had perpetrated. No logical conclusion can be reached other than that defendant had no defense to the charge, that resistance was futile, and he desired to plead guilty to the charge."

State v. Brevet, supra, 144 N. W. 2d at 214.

As we previously noted, the United States District Court did not determine whether the petitioner had validly waived counsel. This question will become decisive only if it determines that the 1945 conviction and sentence cannot be sustained. If the Court so determines, it must then decide the waiver issue.[9] Martin v. United States, 199 F. 2d 279 (8th Cir. 1952).

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[9] See, Brookhart v. Janis, 384 U.S. 1, 2, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); Von Moltke v. Gillies, 332 U.S. 708, 723-724, 68 S.Ct. 316, 92 L.Ed. 309 (1948); Glasser v. United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Johnson v. Zerbst, 304 U.S. 458, 465, 58 S.Ct. 1019 (1938); Davis v. Holman, 354 F.2d 773 (5th Cir. 1965), *cert. denied*, 384 U.S. 907, 86 S.Ct. 1343, 16 L.Ed.2d 359 (1966); Starks v. United States, 264 F.2d 797 (4th Cir. 1959). Henderson v. Bannan, 256 F.2d 363 (6th Cir.), *cert. denied*, 358 U.S. 890, 79 S.Ct. 129, 3 L.Ed.2d

THE 1945 PROCEEDING

The petitioner was convicted after entering a plea of guilty in the District Court for Douglas County, Nebraska, on the charge of stealing an automobile. He was sentenced to a term of three years imprisonment. He contends that he was denied his constitutional right to assistance of counsel when he pled guilty and when he was sentenced.

The Guilty Plea

The record affirmatively demonstrates that the petitioner was represented by a Public Defender when he was arraigned and pled guilty. The Judge's minutes note:

> "8-2-34 Defendant represented by Ed Hayes, public defender, waived preliminary examination, 24 hour service of information, arraigned and pled guilty."

The petitioner attempted to overcome this evidence through the testimony of two eye witnesses who were convicted on the same charge with the petitioner. They testified that the petitioner was not represented by counsel. The United States District Court, commenting on this testimony, stated:

> "The court does not attach enough weight to this testimony to overcome the testimony of Hayes [infra] and the presumption of regularity. Therefore, the court finds that petitioner has not proven by a preponderance of the evidence that he was not represented by counsel at arraignment."

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118 (1958). Williams v. Huff, 79 U.S. App. D.C. 31, 142 F.2d 91 (1944); Rice v. Olson, 144 Neb. 547, 548-549, 14 N.W.2d 850, 852 (1944), *rev'd*, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945); Alexander v. O'Grady, 137 Neb. 645, 290 N.W. 718, *cert. denied*, 311 U.S. 682, 61 S.Ct. 59, 85 L.Ed. 439 (1940).

[4.5] Where the record, as here, affirmatively demonstrates the accused was represented by counsel, the petitioner has the burden of impeaching the record. The District Court found that the petitioner had not met this burden. This finding has substantial support in the record and will not be overturned.

The Sentencing

The court record and the Judge's minutes are silent as to whether the petitioner had assistance of counsel at sentencing. They state:

> "8-3-45 Sentenced to three years in State Penitentiary at Lincoln, Nebraska."

The petitioner and the two eye witnesses, who were sentenced at the same time, testified that counsel was not present.

Ed Hayes was called as a witness by the petitioner. He testified: that he had been employed as a lawyer in the Office of the Public Defender of Douglas County in August of 1945; that he had no independent recollection of representing the petitioner on an automobile theft charge in 1945; that he would not recognize the petitioner but would recognize the name from a 1950 proceeding; that if the transcript of Douglas County showed that he was present during the proceedings, he was present; that it was his practice, as a member of the Public Defender's office, to appear for the sentencing of defendants represented by him at arraignment; that there might have been instances in which he appeared for a defendant at arraignment but did not appear for sentencing, but he didn't believe there were any; that Judge Henry Beal, who presided in Courtroom No. 1 in Douglas County, required that all persons being arraigned and sentenced be represented by the Public Defender's office if they didn't have coun-

sel; that he was present at arraignments of as many as 2,000 or 3,000 people so he could not remember him and thus had to rely on the record for his testimony.

The District Court did not make findings as to whether the petitioner was represented by counsel at sentencing. He stated, however, that he was inclined to believe that counsel was present.

[6, 7] It is clear that the right to counsel extends to the sentencing proceeding. Mempha v. Rhay, 389 U. S. 128, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967); Rini v. Katzenbach, 403 F.2d 697 (7th Cir. November 6, 1968); Davis v. United States, 226 F. 2d 834, 839 (8th Cir. 1955). The right is to be applied retroactively. McConnell v. Rhay, 393 U. S. 2, 89 S. Ct. 32, 21 L. ed. 2d 2 (Per Curiam, October 14, 1968).

[8] Thus, the only serious question is whether counsel was present when the petitioner was sentenced. This is a question of fact which must be determined by the District Court. As the District Court has not done so, we remand for that purpose.

It appears that a question may arise on remand as to whether the burden of proving the absence of counsel at sentencing rests with the petitioner. We, therefore, feel that it is necessary to comment on this issue.

[9] Ordinarily, the burden of proof is on an accused to establish that he was denied the right to counsel. Wilson v. Wiman, 386 F. 2d 968, 969 (6th Cir. 1967), cert. denied, 390 U. S. 1042, 88 S. Ct. 1634, 20 L. Ed. 2d 303 (1968); Davis v. United States, supra. Burgett v. State of Texas, supra, raises serious questions, however, as to whether an accused has such a

burden where the record is silent as to the presence of counsel at a critical stage.[10]

In *Burgett*, the State of Texas offered into evidence a certified copy of one of three prior Tennessee convictions for the purpose of enhancing the penalty under the Texas recidivist statute. The conviction read in part, "Came the Assistant Attorney General for the State and defendant in proper person and without counsel." The petitioner's counsel objected to the introduction of that record on the ground that the judgment on its face showed that the petitioner was not represented by counsel in violation of the Fourteenth Amendment. The court reserved ruling on the objection to permit the state an opportunity to offer any of the other convictions into evidence.

The State then offered a second version of the same Tennessee conviction which stated that the petitioner had appeared "in proper person" but did not contain the additional words "without counsel." This second version also stated that "After said jury had heard the evidence, argument of counsel, and the charge of the court, they retired to consider of their verdict."

No explanation was offered for the discrepancy between the two records, nor was it made clear that counsel was used in the singular or plural in the second version of the conviction. The Supreme Court, in speaking of the Tennessee record, stated:

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[10] The Court in Wilson v. Wiman, 386 F.2d 968 (6th Cir. 1967), recognized this difficulty but stated:

> "Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), does not change the result in this case. There the records in question indicated that the defendant was without counsel or were silent concerning the presence of defense counsel. In the instant case the record contains an affirmative indication that the Appellant was represented at the 1933 trial."

Id. at 969, n.1.

> "* * * In this case the certified records of the Tennessee convictions on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. * * *"

389 U. S. at 115, 88 S. Ct. at 261.

[10] We are inclined to believe that *Burgett* must be read as holding that where the record is silent as to whether an accused was furnished counsel at a critical stage and where the accused introduces evidence tending to show that he was not in fact so represented, the burden then shifts to the state to prove, by a fair preponderance of the evidence, that the accused was represented. See, United States ex rel. McCloud v. Rundle, 402 F. 2d 853 (3d Cir., 1968).

In so holding, we do not intend to indicate to the trial judge our view as to whether sufficient evidence was presented by a state to establish that the petitioner was in fact represented by counsel.

The petitioner also raises a number of other issues in regard to both convictions.

He alleged the 1939 conviction was invalid for the following additional reasons: he was convicted of a crime for which he was not charged (see n. 6); he was beaten by police officers when he would not confess; he was denied counsel although he requested one; he was chained to the bars of the jail; he was not allowed to use the telephone; he did not waive 24-hour service of the information; the transcript of the preliminary proceedings before the Justice of the Peace were not filed at the proper time; and he was promised probation by the police.

He alleged the 1945 conviction was invalid for the following additional reasons: he was coerced through beatings by the police to plead guilty; he was not allowed to use a telephone; the Judge abused his discretion in not allowing the petitioner to withdraw his guilty plea, and he was not informed of his right to a jury trial.

We have examined the record carefully as to these additional allegations and find them without merit.

Reversed and remanded for action consistent with this opinion.

APPENDIX NO. 2

United States District Court
for the District of Nebraska

Robert William Losieau, Petitioner,
V.
State of Nebraska, Respondent.
CIVIL 1137L

Robert William Losieau, Petitioner,
V.
State of Nebraska, Respondent.
CIVIL 1223L

MEMORANDUM

APPEARANCES: For Petitioner: Vincent L. Dowding, Esq. Grand Island, Nebr.

For Respondent: Melvin K. Kammerlohr, Assistant Attorney General, State of Nebraska, Lincoln, Nebr.

VAN PELT, Judge

These two cases are habeas corpus matters brought by petitioner, Robert William Losieau, to test the validity of his present incarceration in the Nebraska Penal and Correctional Complex. While these two cases were filed separately, they have been treated as if they were one action and were tried together.

The background of this litigation is that on September 1, 1939 petitioner was charged with and pleaded guilty to a charge of armed robbery in Hall County, Nebraska (Petitioner's Exhibit 1). A journal entry was apparently not prepared and entered on this arraignment, plea and sentencing until 1952. In that journal entry it was stated that petitioner plead guilty to and was sentenced for the crime of *burglary*. Burglary was not charged against the petitioner in 1939. In 1965 the county attorney of Hall County moved for

an order nunc pro tunc correcting the journal entry to read armed robbery rather than burglary, alleging that the discrepancy was "a scrivener's error", (petitioner's Exhibit 1). Petitioner had brought a post-conviction action under the Nebraska act which prompted the motion for a nunc pro tunc order. Both motions were heard on the 19th of February, 1965 and on February 23, 1965, the nunc pro tunc order was entered and petitioner's motion to vacate was denied. In reaching this decision, the court found that "due notice of the time and place of this hearing" was given petitioner. At the time of the hearing, petitioner was incarcerated in the Penal and Correctional Complex in Lincoln and was apparently indigent. Counsel had not been appointed for him (although none was apparently requested by petitioner) and no appearance was made on his behalf, (Petitioner's Exhibit 1). Petitioner was sentenced in 1939 to seven years for the crime.

This 1939 conviction was taken to the Nebraska Supreme Court under the post-conviction act and is reported at 180 Neb. 616, 144 N. W. 2d 210 (1966) under the name of *State* v. *Brevet.* In the case numbered 1223L, petitioner attacks this conviction. The court finds that petitioner has exhausted his state remedies as to this conviction.

In 1945, petitioner was charged in Douglas County, Nebraska, with the crime of stealing an automobile. He plead guilty to the charge on August 2, 1945 and was sentenced on August 3, 1945 to three years in prison. This conviction was also attacked in a post-conviction action, reported as *State* v. *Losieau*, 180 Neb. 671, 144 N. W. 2d 406 (1966). In case numbered 1137L, petitioner attacks this conviction. The court finds that petitioner has exhausted his state remedies as to this conviction also. Petitioner's exhibit 2 contains the information pertaining to this conviction.

It also appears that on September 16, 1948, petitioner was convicted, upon a guilty plea, of the charge of passing forged postal money orders. This conviction was in the United States District Court, Northern District of Iowa, Cedar Rapids Division, at Waterloo, Iowa, in case Number 2160 Criminal (See page 3 of the transcript to the Nebraska Supreme Court in petitioner's Exhibit 5). Petitioner was sentenced to five years imprisonment for this conviction. He does not currently attack this conviction.

In 1952 petitioner was charged in Douglas County, Nebraska, with the crime of burglary, (Petitioner's Exhibit 3 and page 1 of the transcript to the Nebraska Supreme Court, petitioner's Exhibit 5). The information also charged petitioner in Count II with being an habitual criminal. On July 9, 1952, petitioner was found guilty of burglary by a jury. A hearing was then held on the habitual criminal count. The original information on Count II listed only the 1939 Hall County and 1945 Douglas County convictions. On September 29, 1952, after continuing the hearing several times, the state moved to amend the information (Petitioner's Exhibit 5, p. 27-28 of the transcript to the Nebraska Supreme Court). This motion was granted, (Petitioner's Exhibit 5, p. 29 of the transcript). The amendment added the 1948 federal court conviction to Count II. On October 9, 1952, petitioner was found to be an habitual criminal by the Douglas County District Court and was sentenced to twenty years imprisonment, the maximum sentence under the habitual criminal statute which then existed. § 29-2221 Neb. Rev. Stat., Reissue of 1964. Petitioner is currently serving this sentence, although the sentence is due to expire December 19, 1967 or on December 6, 1967 if petitioner elects to donate a pint of blood to the Red Cross on the latter date. At the conclusion of this sentence, petitioner

will begin serving a 1962 Dodge County, Nebraska sentence of twenty years. This conviction (1962), is not before the court at this time. However, it is important, as it raises questions of petitioner's right to his immediate release.

Petitioner does not attack that part of the 1952 conviction which found him guilty of burglary, but only attacks the determination that he is an habitual criminal. If he had not been determined to be an habitual criminal, he could only have been sentenced to a maximum of ten years under the burglary statute, § 28-532, Nebr. Rev. Stat., Reissue of 1964.

I.

Several procedural problems must be met before proceeding to the merits of these cases. First, it might be argued that, where the original sentences under prior convictions have already been served and those convictions are only being used in an habitual criminal charge, a habeas corpus court cannot inquire into the legality of those convictions. Any doubt which may have existed on this point has been laid to rest by the United States Supreme Court in the recent case of *Burgett* v. *Texas*, — U. S. —, 35 Law Week 4014, (Nov. 13, 1967). In that case, the court said: "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer* v. *Beto*, 384 U. S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." (36 L.W. at 4015)(Emph. and parenthetical expression in original.)

There also appears to be some doubt about the right

of the petitioner to bring this action. This is based on the fact that as soon as the present sentence expires, he will begin serving the one given him by the Dodge County District Court in 1962. However, this court is of the opinion that petitioner does have standing to bring this suit and request a writ. He is attacking the sentence he is currently serving. If he cannot attack that sentence now, he will never be able to attack it. Admittedly, he could not attack the 1962 conviction and sentence in this court at the present time. *McNally* v. *Hill,* 293 U. S. 131 (1934); *Burnside* v. *State of Nebraska,* 378 F. 2d 915 (8 Cir. 1967). However, petitioner has served longer than ten years, which was the maximum sentence in 1952 for the crime of which he was convicted if he had not been found to be an habitual criminal. Thus, he is entitled to his "immediate release" from the sentence he is currently serving if the convictions used as a basis for such determination are found to be constitutionally inadequate. *Greer* v. *Beto, supra,* and *Ex Parte Greer,* 408 S. W. 2d 711 (Tex. 1966).

These two cases, 1137L and 1223L, must be considered together for the petitioner to be entitled to any relief. The Nebraska statute concerning the habitual criminal determination, § 29-2221, Neb. Rev. Stat., Reissue of 1964, provides that a person can be determined to be an habitual criminal upon a showing of two prior felony convictions, one of which must be from Nebraska. After the amendment to the information, the 1952 Douglas County District Court had three convictions to rely on in determining that petitioner was an habitual criminal. One of those convictions is not being challenged here. Thus, if either one of the two attacked convictions is found to be valid, then petitioner can not be afforded the relief he asks. This court is inclined to liberally construe pleadings filed by prison-

ers who are unlearned in the ways of the law. *Barry* v. *Sigler*, Civ. 1237L; *McClelland* v. *Sigler*, 1280L; *Sharp* v. *Sigler*, 1279L; *Yates* v. *Sigler*, 1281L; *Davis* v. *Sigler*, 1282L (all recently decided by this court).

II.

1137L—the 1945 Conviction.

Petitioner claims, through court-appointed counsel, in his amended petition (filing # 21) that he was without funds to hire an attorney, that he requested one many times and was refused, that he was denied the right to make a telephone call, that he was "punched and beaten" and otherwise coerced into pleading guilty by Douglas County police officials, that he was without counsel at his arraignment and sentencing, that he was not given a copy of the information or given a preliminary hearing, that petitioner at the sentencing attempted to withdraw his formerly entered guilty plea and plead not guilty, which was refused, and all of the above constitute a violation of his constitutional rights.

Petitioner has never been given a hearing on the merits of his claim in the state court. His claims, if proven, would entitle him to relief. Thus, under the teachings of *Townsend* v. *Sain*, 372 U. S. 293 (1963), this court is required to give petitioner that hearing. Evidence was introduced at the hearing tending to show that petitioner, in fact, did not commit the crime with which he was charged. It is not the office of a habeas corpus court to consider the guilt or innocence of the petitioner. Its task is only to determine whether the petitioner had a trial free from constitutional infirmity. *Davis* v. *North Carolina*, 384 U. S. 737 (1966); *Rogers* v. *Richmond*, 365 U. S. 534 (1961).

Petitioner and two other persons, Peter Vlad and Chester Hert, were charged with the crime of auto

theft. All three testified at the hearing of this case. Their testimony indicates that all three of them were held in the same cell, were arraigned, and were sentenced together.

Petitioner claims that before he was placed in the same cell with Vlad and Hert, he was physically abused and coerced by the Omaha Police with the effect that he involuntarily pled guilty. There is no evidence in the record to support this contention other than petitioner's testimony. It is also interesting to note that although petitioner was placed in the cell with Vlad and Hert shortly after the alleged beating took place, neither of them indicated that they observed any of the effects of the beating. The court finds that petitioner has not established by a preponderance of the evidence that he was beaten and coerced into entering a guilty plea.

Petitioner also contends that he was not allowed to use the telephone. At the hearing, petitioner's uncle, Michael F. Kracher, testified that he was phoned by someone at the jail, apparently either the petitioner or one of the jailers at petitioner's request, and that he came down to the jail and advised petitioner to get himself an attorney. The court finds no deprival of any right to petitioner in this situation.

The records of the Douglas County District Court indicate that petitioner was represented by counsel at his arraignment, that petitioner validly waived the right to a preliminary hearing and the right to receive a copy of the information in advance of arraignment (Exhibit 4, Transcript, P. 3). Petitioner at trial did not show this court that his waiver of preliminary hearing and right to the information in advance of trial was invalid. There is a presumption in favor of the validity of court records and judgments and the habeas applicant must overcome that presumption to prevail. *United*

States ex rel. Dugger v. *Murphy*, 219 F. Supp. 596 (N. D. N.Y. 1963); *Williams* v. *Kaiser*, 323 U. S. 471, 474 (1945); *Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938). In addition to this presumption, there was the testimony of Ed Hayes that Judge Beal, who according to the record was the trial judge in 1945, made it a practice to appoint counsel for all defendants who were being arraigned before him. Hayes did not have any independent recollection of being appointed in 1945. This is not surprising in view of the years that have elapsed and the number of cases handled by Mr. Hayes, as a member of the Public Defender's staff in Douglas County. The petitioner, Vlad and Hert denied that counsel was appointed for petitioner or that any attorney ever came to see him or appeared in court with him. The court does not attach enough weight to this testimony to overcome the testimony of Hayes and the presumption of regularity. Therefore, the court finds that petitioner has not proven by a preponderance of the evidence that he was not represented by counsel at the arraignment.

A slightly different problem is presented by the question of sentencing. Neither the court records (Exhibit 4, Transcript pp. 3 and 4) nor the judge's notes (Exhibit 8), indicate that counsel was present at the sentencing. Hayes testified, however, that it was the practice of the public defender's office to attend the sentencing where they had been present for arraignment. He knows of no instance in which this was not done. Thus the court is inclined to believe that he was present at the sentencing of petitioner. In addition, the normal remedy where counsel was not present at the time of sentencing is to have the individual resentenced. The defect does not affect the validity of the conviction. *United States ex rel Wagner v. Myers*, 234 F. Supp. 239 (E.D. Penn. 1964); *Hollis* v. *Ellis*, 201 F.

Supp. 616 (S.D. Tex. 1961). Where the conviction has been used in an habitual criminal charge, it is the validity of the conviction which is important, nor that of the sentence. See the memorandum opinion of this court in *Kennedy* v. *Sigler*, 1243L. It would seem to be irrelevant to the question raised here whether petitioner had counsel at the sentencing or not.

It is the opinion of the court that petitioner has not shown any constitutional infirmity in his 1945 Douglas County conviction and that it could be properly used against him in an habitual criminal count.

III.

1223L—the 1939 conviction.

In view of the decision reached above in case 1137L with regard to the 1945 conviction, the issue in this case becomes moot. Since the 1945 conviction is valid, that coupled with the 1948 Iowa Federal Court conviction which is not being attacked here, is sufficient to sustain the habitual criminal determination made in 1952. The validity or invalidity of the 1939 conviction is now of no consequence, in light of the fact that petitioner finished serving that sentence over twenty years ago.

IV.

At the trial of this action, petitioner's counsel also raised the claim that the convictions had not been properly proven in the 1952 conviction. This appears to be a question which has never been presented to the state courts for their determination. Thus, any contentions in regard to this cannot be raised without first exhausting state remedies.

Dated: December 11, 1967.